UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-052-24-3119-D2
Issued to: John VALLADARES

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2047

John VALLADARES

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 30 April 1974, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for nine months outright plus three months on 15 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a fireman on board the United States SS SAN JUAN under authority of the document above captioned, on or about 13 September 1973, at Port Elizabeth, New Jersey, Appellant:

(1) assaulted and battered one Robert Hyer, a crewmember of the vessel;
(2) assaulted and battered one James R. Wilson, a crewmember of the vessel; and
(3) assaulted and battered one Stephen Bertrand, second officer of the vessel.

At the hearing, Appellant was represented by professional counsel. Since Appellant himself did not appear, the Administrative Law Judge entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records and the testimony of two witnesses.

In defense, Appellant offered in evidence the testimony of one witness taken by deposition.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all documents issued to Appellant for a period of nine months outright plus three months on 15 months' probation.

The entire decision and order was served on 20 February 1975. Appeal was timely filed on 18 March 1975 and perfected on 3

December 1975.

FINDINGS OF FACT

On 13 September 1973, Appellant was serving as fireman/watertender aboard SS SAN JUAN under authority of his duly issued merchant mariner's document. At about 0900 on that day, the vessel was preparing to get underway from Port Elizabeth, New Jersey, and the deck crew was assembled under the direction of the second officer, Stephen Bertrand, to raise the gangway. Appellant, carrying a shopping bag, came up the gangway and, as he neared the deck, gestured at and generally vilified the deck crew. Arriving on deck he pointed to individuals and addressed abusive epithets to them. He passed Bertrand, and a seaman named Wilson, and approached a seaman named Hyer.

Directing profane language at Hyer he grabbed the fat of Hyer's abdomen. Hyer reacted by grabbing Appellant and the two shoved each other. Appellant then turned back up the deck, rudely brushed hard against Bertrand, and, using vile language to Wilson, struck him a hard blow on the right side of his head with a fist. Wilson was knocked back against a railing.

Bertrand and the boatswain, one Cyril Mize, stepped between Appellant and Wilson, and Bertrand ordered Appellant to leave the ship. Appellant directed foul language to Bertrand and pushed against him in another effort to get to Wilson. The Chief Officer arrived on the scene and also ordered Appellant to leave the vessel. When Appellant refused, using vile language to the mate, Bertrand left to get the master. The master returned with him, carrying a "mace" spray. Appellant then refused to obey the master's orders to leave the vessel, and asked to be allowed to remain. The master would not agree but permitted Appellant to go to his room to get money and possessions.

Escorted to his room by the two other officers and three seamen, Appellant took nothing but returned to the main deck. AS he passed through from the house to the deck he pushed the master and swung at Bertrand who had moved to grab him and who was pushed two or three feet back to a bulkhead. When Appellant seized a rail and resisted efforts to move him, the master warned him that the mace spray would be used. After continued resistance Appellant was subdued by two sprays of the chemical. Four men lifted him and carried him down the gangway, placing him on his feet on the land side. Appellant continued threatening and trying to hit various crew members. He was left behind by the others and the gangway was taken in, the ship sailing twenty minutes late as a result of the episode.

The master immediately reported the matter to the company

office, with a request that appellant be located and rendered any needed medical attention.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the evidence does not support the findings and that the order is too severe.

APPEARANCE: Donald B. Olman, Esq., New York, New York

OPINION

I

Appellant's claim that the evidence does not support the findings is based on two contentions. One is that conflicts in the eyewitness testimony are so direct and irreconcilable that they nullify the probative value of the evidence; the other is that judicial pronouncements as to standards of conduct of seamen demonstrate that what is involved here, while viewable as misconduct in other areas of society, is not misconduct at all for a seaman but is understandable and tolerable activity.

II

On the latter point Appellant quotes language from The Nimrod (1822), Fed. Cas. 10267, as setting the standard by which seamen are to be judged. Most specifically the assertedly controlling language seems to be: "defects of temper and manners...should be looked on with indulgence, and...every hasty work or imprudent act should not be seized upon as a pretext for inflicting forfeitures." Appellant's conduct in this case, it is urged, is clearly within the limits of excusability found by the court.

In immediate connection with the quoted statement (part of a lengthy and didactic essay on seamen's life), the court however, also noted the severity of the disciplinary means available to a master in cases meriting chastisement. We need not, here, enter upon a study of social history to determine whether as severity of punishment to erring seamen has progressed to a lower degree the customary standards of seamen's conduct have risen to the measurements of conduct of those of similar grade in less hazardous callings. The language of the court must be taken in its context.

The master had discharged a seaman in a foreign port, after jailing him, and had denied him any wages or medical care. The court declared that the mere statement of a conclusion of the master as to the man's conduct was not enough, and that the facts

constituting the alleged misconduct must be ascertained. It found that the near mutinous actions of two other men were not ascribable to this seaman so as to justify forfeiture of all wages but that only markedly lesser infractions by the man (not specified by the court) had been established. As a significant clue to what in fact the master had been able to demonstrate as the grounds for his severe punishment, the court, we find, gave as example in point: "...masters do not always very scrupulously measure the words in which their commands are given, and if orders are sometimes given in an overcharged manner, it is not surprising if the answers should have something of the same coloring." We have in this a background of provocation and "manners" (a term used by the court itself) in speech.

Appellant has volunteered no explanation of his conduct to lead to the belief that his initial hostile attitude toward his fellow crewmembers and his first resort to laying hands on one of them were provoked in any way. Three assaults and batteries hardly come within the scope of The Nimrod's reference to every "hasty word or imprudent act," and even an attempted explanation would have to be weighed carefully before it could in any wise be accepted as rebuttal.

III

As to conflicts in the testimony, the Administrative Law Judge gave the problem the attention it merited and carefully distinguished the unquestionable basic elements of the testimony from those apparent, yet non-essential differences in detail that can be expected from any group of witnesses to a flurry of activity. (The attention given is illustrated well in the case of the first specification in which it had been alleged that the battery had occurred by striking Seaman Hyer with fists; it was found in fact, as described above, that the battery was accomplished not by blows but by seizing and squeezing a portion of Hyer's anatomy, with the result that the reference to "fists" was struck from the specification as found proved.) The Administrative Law Judge sifted the evidence and found an irreducible quantity that stands the tests of reliability and probative value.

What Appellant urges, on the other hand, is impossible to accept. For instance, with respect to the assault and battery on Hyer, Appellant points out that one witness testified that Appellant "grabbed Hyer's pot stomach," and another saw (when he looked) only a "pushing and shoving match," and a third (whose testimony was placed in evidence by Appellant himself) that Hyer, not two other people, stepped between Appellant and Wilson. From this Appellant urges that there is no evidence "as to whether Hyer was even touched." Again, in dealing with the Wilson episode,

Appellant urges that "the most that can be said...is that perhaps Wilson was struck because three witnesses [including Appellant's own] have so testified," but that it is "as logical to conclude" that since the three witnesses differ in details "he was not struck at all." Of this, I can only say that the "perhaps" in Appellant's language should be "probably" and that the logical basis for his conclusion of no striking at all is nowhere apparent.

The resolution of conflicts in testimony of eyewitness is a frequent task of a trier of facts. The accuracy of actual sight and the recollection of what was seen in violent occurrences are proverbially the source of discrepancy and the evaluation of probabilities is the determinant in weighing the evidence. The trier of facts here has not relied on evidence intrinsically inconsistent or inherently unbelievable. The facts found are supported by evidence of probative value. The result urged by Appellant, that "nothing happened at all" is equiprobable with what the Administrative Law Judge found, is the one result that cannot, by any stretch of the imagination, be justified.

IV

Appellant complains also that the order is too severe in light of the nature of the misconduct found proved. Two elements are properly considered in determination of an adequate order. One is the conduct which has just been considered. The other is the past record of the party.

From the initial decision we see, "this is the fifth hearing involving...[Appellant] since 1966 and the eighth time since 1953 that...[he] has been before the U.S. Coast Guard for the commission of misconduct offenses. In addition this is the third time that...[he] has been found guilty after hearing of committing the offense of assault and battery." Beyond this, it was considered that no real injuries to persons resulted but that the sailing of the ship had been delayed for at least twenty minutes by the disorder. It was charitably assumed that Appellant might have been misled by leniency of the last two actions entered in his record. For this reason, further leniency was accorded in framing the instant order. The warning in the initial decision that further recurrence of this type of misconduct might well result in revocation of his document could supportably have been obviated by entry of such an order in this case.

There is no reason whatever to disturb the order as too severe.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 30 April 1974, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 3rd day of February 1976.

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